UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ALGORITHMS FOR BEHAVIORAL CARE, INC. d/b/a OQ SYSTEMS, Plaintiff,	:	
-vs-	:	Civil No. 3:02cv23 (PCD)
CURTIS REISINGER, MICHAEL LAMBERT & GARY BURLINGAME, Defendants.	:	

RULING ON DEFENDANTS' MOTION TO DISMISS OR ALTERNATIVELY TO STAY PROCEEDINGS

Defendants move to dismiss or stay the present action on pending arbitration and litigation in Massachusetts. The motion to dismiss is denied and the motion to stay is denied.

I. BACKGROUND

Defendants comprise the entire membership of American Professional Credentialing Services, LLC ("APCS"). APCS develops and sells material to facilitate the treatment and care of mental health disorders. On September 19, 1997, APCS entered into a License and Distribution Agreement ("Agreement") with plaintiff under which plaintiff was granted the exclusive right to use APCS's printed materials in fashioning a computer software representation of the same. In exchange for the software, plaintiff would *inter alia* pay APCS license fees. If plaintiff failed to meet its license fee quota as defined in the Agreement, APCS could terminate the relationship on thirty days' notice, although plaintiff could cure its failure by remitting an amount equal to the license fee deficit within the notice period. The Agreement contained an arbitration clause governing "[a]ny controversy or claim, including

all disputes relating to arbitrability, arising out of or relating to this Agreement or the breach thereof."

In 2000, APCS terminated the Agreement for failure to meet its annual quota. On July 3, 2001, plaintiff filed a demand for arbitration alleging that APCS improperly terminated the Agreement and failed to honor the exclusive arrangement promised it. Plaintiff sought a preliminary injunction in the United States District Court in Massachusetts by which APCS would be required to abide by the Agreement pending the outcome of arbitration. On August 31, 2001, the Court adopted a "stipulated standstill agreement" by which the parties agreed to abide by the exclusivity provision pending resolution of the arbitration. The Court "retain[ed] jurisdiction over [the] matter for purposes of interpreting and enforcing [the] Order."

On December 18, 2001, the arbitrator dismissed a counterclaim against Geoffrey Gray, plaintiff's president, ruling that members of the corporation were not parties to the Agreement. On December 26, 2001, plaintiff sought to amend its statement of issues to include claims of fraud arising from the Agreement. On January 4, 2002, plaintiff filed the present complaint, alleging claims of fraud identical to those presented in the amended statement of issues but against the membership of APCS rather than the company itself. On February 22, 2002, the arbitrators accepted plaintiff's amended statement of issues.

II. DISCUSSION

Defendants argue that the first filed Massachusetts complaint precludes action on the present complaint. Plaintiff responds that there is no pending action as the standstill agreement resolved the pending Massachusetts action.

"Where there are two competing lawsuits, the first suit should have priority, absent the showing

of balance of convenience . . . or . . . special circumstances . . . giving priority to the second." *Motion Picture Lab. Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16, 19 (2d Cir. 1986)(internal quotation marks omitted). It is proper to either stay or dismiss the subsequently filed case in deference to the earlier-filed case. *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991). Dismissal is appropriate where "an identity of issues exists and the controlling issues in the dismissed action will be determined in the other lawsuit." 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1360, at 442 (1990).

The prior pending action doctrine is closely related to claim preclusion, with the object of the former to avoid the inefficiencies of litigating that which will be precluded by the latter. *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). A claim will be precluded when "the same or connected transactions are at issue and the same proof is needed to support the claims in both suits or, in other words, whether facts essential to the second suit were present in the first suit." *Id.* at 139. An issue is precluded if it could have been raised in an earlier suit, regardless of whether it actually was raised. *Clarke v. Frank*, 960 F.2d 1146, 1150 (2d Cir. 1992).

The prayer for relief in the Massachusetts complaint was limited to seeking a status quo arrangement to facilitate arbitration. As the standstill agreement does precisely that and the parties are presently in arbitration, there appears to be no issue pending before the Massachusetts District Court. It is further not apparent, as will be discussed subsequently, that the same defendants are involved in the two actions, thus it is dubious that the actions may be deemed "competing." *See Motion Picture Lab. Technicians Local 780*, 804 F.2d at 19. The action in this Court seeks damages based on conduct of the individual defendants, apart from any liability of APCS, the defendant in the case in Massachusetts.

The present complaint will therefore not be dismissed based on the existence of a prior pending action.

Defendants also argue that the action should be either dismissed or stayed as it is duplicative of the arbitration proceedings. Plaintiff responds that the Massachusetts action and arbitration involve a corporate defendant, not the present defendants, thus the present action may not be considered duplicative.

Undisputedly, only plaintiff and APCS are parties to the Agreement. Defendants allegedly comprise the entire membership of APCS as a limited liability company incorporated under the law of Connecticut. Generally, a member or manager of an LLC is neither liable for the acts of the LLC, *see* CONN. GEN. STAT. § 34-133(a), nor a proper party to an action against an LLC, *see* CONN. GEN. STAT. § 34-134. These statutory provisions are simply manifestations of the legal fiction that "[a] corporation is a separate legal entity, separate and apart from its stockholders." *Litchfield Asset Mgmt. Corp. v. Howell*, 70 Conn. App. 133, 135, --- A.2d ---- (2002)(internal quotation marks omitted). Assuming arguendo that defendants' acts establish the liability of APCS, such a determination would not reciprocally establish liability of the individual defendants because of their insulation from corporate liability. Further the complaint alleges conduct on the part of the individual defendants apart from that which is creative of liability of APCS but rather is creative of liability on their part individually.

The cases cited by defendants in support of their argument that a stay may enter against those who are not parties to the arbitration agreement, *see, e.g., Dale Metals Corp. v. Kiwa Chem. Indus. Co.*, 442 F. Supp. 78, 81 (S.D.N.Y. 1977), do not involve multiple plaintiffs and defendants where at least one plaintiff and one defendant have agreed to arbitrate the dispute. In such a case, a stay would further the policy favoring arbitration of disputes. In the present case, defendants have no stake in the

arbitration proceedings other than their allegation that their conduct may be creative of liability on the part of the corporate defendant. The two proceedings, although both involve agents of the corporate defendant, require separate determinations of liability. As such, it is not apparent how judicial efficiency would be served by staying the present proceeding.

IV. CONCLUSION

Defendants' motion to dismiss (Doc. 17) is **denied**. Defendants' alternative motion to stay the present proceedings pending resolution of the arbitration proceedings is also **denied.**

SO ORDERED.

Dated at New Haven, Connecticut, July __, 2002.

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Peter C. Dorsey
United States District Judge